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**M E M O R A N D U M**

**TO:** Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

**FROM:** Andy Franken

**DATE:** February 18, 2010

**RE:** SB-337 – Creation of a Cause of Action for Gender-Based Harm

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The Wisconsin Insurance Alliance appreciates the opportunity to comment on the above captioned bill. As you know, the bill as originally drafted allowed for civil cause of actions for “any acts related, in part, to gender”. The WIA acknowledges and appreciates the introduction of Senate Amendment 2, which attempts to further clarify the author’s intention to address violent acts. Below are some comments and suggestions to address concerns with the legislation.

**General Concerns**

1. The gender-based actions addressed in the bill are for the most part already covered under other provisions of Wisconsin law, both as crimes and as a basis for civil actions, but in a much more defined way. In addition, Senate Bill 344, making crimes based on gender of victim subject to a penalty enhancer and providing a penalty, is working its way through the legislative process.
2. Because many of the terms (e.g., “threat of violence,” “physical intrusion” and “invasion of a sexual nature”) in proposed § 895.437 are not defined in Wisconsin law (or in this bill) and are vague and subjective in nature, the proposed legislation opens the door to continuous litigation on what actions are and are not “gender-based acts.” The burden on our court system should be considered, especially in light of the fact that many of the acts considered “gender-based” would already be subject to other Wisconsin law provisions. We would suggest changing these terms to coincide with the criminal statutes or perhaps defining them in the bill. Senate Amendment 2 makes a significant advancement in this area.
3. The statute of limitations for this proposed new action, compared to statutes applicable to other causes of action under Wisconsin law, is extremely long. There is no logical reason why, for example, a wrongful death action should be 3 years and an action for threat of violence should be 7 years.



### **Specific Concerns**

1. The proposal needs to expressly exclude actions that occur in the workplace. These actions should be subject to Chapter 102 as the exclusive remedy.
2. The proposal also needs to expressly exclude actions that may fall within Chapter 111. If the bill goes forward, I would suggest it be amended to address both of these concerns as follows:

- (7) This section does not apply to actions that would otherwise be subject to chs. 111 or 102 of the Wisconsin Statutes.

The intent is to exclude any action that could be brought under either Chapter 111, Employment Relations, or Chapter 102, Worker's Compensation, from being brought under § 895.437. To state it another way, if the action could be brought under Chapter 111 or Chapter 102, it cannot be brought under § 895.437. Otherwise a state of confusion will reign in both employment and worker's compensation law. LRB may have a better way to get at this intent than the language proposed above.

3. The bill needs to clarify that the actions falling within proposed § 895.437 are not insurable under Wisconsin law. Suggested language is as follows:
  - (8) No damages of any kind, whether awarded through a court action or by settlement, arising out of or in connection with an action brought under this section are insurable under any policy of insurance issued in this state.





# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

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TO: Members, Senate Committee on Judiciary, Corrections, Insurance,  
Campaign Finance Reform, and Housing  
FROM: Andrew Cook, on behalf of the Wisconsin Civil Justice Council, Inc.  
DATE: February 18, 2010  
RE: Opposition to Senate Bill 337

The Wisconsin Civil Justice Council, Inc. (WCJC) was formed in early 2009 to represent Wisconsin business and other interests on emerging civil litigation challenges before the Legislature. The WCJC consists of a broad coalition of groups whose primary goal is to achieve fairness and equity, reduce costs, and enhance Wisconsin's image as a place to live and work.

Although WCJC does not dispute the well intended motives behind the introduction of Senate Bill 337, WCJC opposes the bill for the reasons explained below.

### **"Gender-based Act" Definition is Vague and the Bill Allows Damages for More than Just Violence Motivated by Gender**

The purpose of SB 337 ostensibly is to add a private cause of action for "acts of violence motivated by gender." However, SB 337 goes well beyond simply adding a new civil cause of action for *violence* motivated by gender. The legislation's vague definition of "gender-based act" allows a lawsuit to be filed if either of the following occurs:

1. An act that is committed, at least in part, on the basis of the victim's gender.
2. A physical intrusion or invasion of a sexual nature that the actor commits under coercive conditions

The first provision would allow any "act" that is committed, "at least in part, on the basis of the victim's gender." This extremely vague definition goes well beyond allowing a private cause of action for violence motivated by gender and will likely lead to more lawsuits where no violence actually occurred.

### **Statute of Limitations is Substantially Longer than other Tort Statute of Limitations**

Statutes of limitations are essentially a legal countdown that begins when someone is injured. When the time period expires, a claim may no longer be brought. As explained in greater detail below, WCJC has concerns with the bill's inordinately long statute of limitations.

### **Public Policy Behind Statute of Limitations**

Statutes of limitations are important because some period is needed to balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale or fraudulent claims. As time passes, witnesses become difficult to locate or pass away, records are lost or discarded, and memories fade. Without statutes of limitations, litigation can become a "he said-she said" situation.

When setting statute of limitations, lawmakers must strike a difficult balance. On the one hand, potential plaintiffs should have an adequate opportunity to bring a claim. On the other, defendants and the courts must be protected from having to deal with cases in which the search for the truth may be seriously impaired by the loss of evidence, witnesses, and fading of memories. By striking this balance, statutes of limitations promote justice, discourage unnecessary delay, and preclude the prosecution of stale or fraudulent claims. These laws are essential to a fair and well-ordered civil justice system. The possibility of an unfair trial is heightened when heart-wrenching allegations are involved.

In addition, statutes of limitations provide predictability and certainty to the business community as well as nonprofit organizations. It allows them to accurately gauge their potential liability and make financial and insurance coverage decisions accordingly.

#### Statute of Limitations for Similar Torts

In Wisconsin, personal injury and wrongful death claims must generally be brought within three years. Wis. Stat. § 893.53. Medical malpractice claims must be brought within three years of the date of injury or one year from discovery of the injury, but not more than five years from the date of the act. Wis. Stat. § 893.55 (1m). The statute of limitations for claims involving intentional torts, such as libel, slander, assault, battery, and invasion of privacy, is two years. Wis. Stat. § 893.57. (Note: Senate Bill 182 (Act 120) amends current law by changing the statute of limitations for intentional torts from two to three years.)

Unlike existing statutes of limitations – which range from two to five years – SB 337 would allow a claim to be brought within seven years after the cause of action accrues. As noted above, current law already provides a cause action for assault, which statute of limitations’ is three years.

Thus, it is not clear why an extended statute of limitations of seven years is necessary for this tort.

#### **Senate Bill 337 Unnecessarily Adds New Cause of Action and Unjustly Shifts Fees to Defendants**

Existing case law already allows a plaintiff to bring a private cause of action for assault, battery, and for intentional infliction of emotional distress. Each of these causes of action could be used in circumstances where the abusive behavior was gender-based. Also, depending on the circumstances, a plaintiff bringing an existing common law cause of action may seek emotional distress or punitive damages.

Moreover, Wisconsin’s Fair Employment Law currently allows employees to sue an employer for workplace discrimination. Last year, the Wisconsin Legislature amended the WFEL when it enacted 2009 Wisconsin Act 20. The new law expanded the WFEL by adding punitive and compensatory damages. These damages are in addition to existing remedies under the WFEL, such as back pay, attorney fees, and court costs.

Senate Bill 337 also unfairly shifts fees in favor of plaintiffs, but never in favor of the defendant if he or she is wrongly accused. This fee-shifting mechanism will have the unintended consequence of wrongly accused defendants having to pay exorbitant attorney fees and litigation costs, yet not be able to recover those costs.

#### **Conclusion**

Clearly there is no place in society for violence against another person based on his or her gender. However, as explained above, existing common and statutory laws provide sufficient remedies. Based on the foregoing, WCJC respectfully opposes SB 337.



STATE REPRESENTATIVE  
**TERESE BERCEAU**

WISCONSIN STATE ASSEMBLY

76TH DISTRICT

**TESTIMONY IN SUPPORT OF THE GENDER VIOLENCE ACT – SB 337  
SENATE COMMITTEE ON JUDICIARY, CORRECTIONS, INSURANCE, CAMPAIGN  
FINANCE REFORM AND HOUSING**

**February 18, 2010**

**By Representative Terese Berceau, Assembly Lead Author (AB 480)**

You've been raped. Or you've been beaten. Or both. You have insurance but there are co-pays that mount as you go to doctors to repair your face, your teeth, your jaw. Or you don't have insurance and need medical care and the bills are frightening, but you have to go to get well, to get "repaired".

You need a counselor to help you hold yourself together and move on with your life. Maybe your insurance covers it, maybe not.

You can't go to work for a while due to the trauma and physical injuries. Maybe you lose your job because you have to miss too many days of work.

You get behind on your rent. Maybe your landlord ends your lease. Or maybe you just leave, owing him or her a lot of money. But you don't have an income to pay for it anymore.

Maybe you start depending on pills for the pain, or alcohol, compounding your problem, and you need a recovery program.

Too often victims of sexual assault or domestic violence suffer far beyond their actual physical injuries. Too often they bare the burden of most, if not all, of the economic consequences of the crime that has been committed. This is the reason for the bill before you today, the Gender Violence Act.

The Gender Violence Act gives victims of violence a legal right to a specific civil cause of action for assaults motivated by gender. The bill is gender neutral – it applies to crimes against both men and women. Victims may recover damages for emotional distress, punitive damages, and investigation or litigation costs, including attorney fees.

It recognizes in law that perpetrators of crimes such as sexual assault and domestic violence use a fundamental aspect of a victim's identity, his or her gender, as a basis to control, demean, and degrade through violent acts.

Congress, through the Violence Against Women Act, gave victims the civil right to hold perpetrators accountable in federal courts. However, in 2000 the U.S. Supreme Court struck down that right, stating that Congress exceeded its authority in opening the federal courts to victims of gender violence. However, the Court ruled that **states** could provide victims with a civil right to sue perpetrators. Illinois, California, and other states have already done so.

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Violence against women, in particular, constitutes a grave civil rights problem with enormous economic consequences. Minnesota calculated that the cost of sexual violence in that state is \$1.3 billion a year. In Wisconsin, there are around 30,000 acts of domestic violence each year. This past year we saw a record number of deaths.

But can't survivors already sue? Yes, but many don't because there are substantial barriers.

The current statute of limitations to recover for personal injury in cases of battery and assault is only two years. A victim of sexual assault or domestic violence often cannot bring suit within this timeframe. He or she may still be going through the initial criminal case, which may or may not result in conviction.

If the perpetrator is not convicted, a victim's reality can be years of harassment, restraining orders, and moving over and over. I personally know someone who was in that position for many years.

The psychological damage stemming from a violent assault often lasts much, much longer than the physical damage. Rebuilding a life and meeting basic survival needs takes all the strength a victim possesses. At a civil trial the victim is forced to relive the horror and degradation of the attack all over again. Thus, he or she simply may not be ready to bring a civil suit within two years. Therefore, the Gender Violence Act set the statute of limitations at seven years.

Lawyers are more reluctant to take cases based on gender violence, relative to other personal injury suits. There is a limited legal history of survivors suing rapists and batterers in civil court because we have been slow to recognize the unique after-effects of this type of assault. The Gender Violence Act will provide specific legal authority for recovery and damage awards which will, we hope, encourage attorneys to take these important cases and pursue them with the same vigor as other cases of assault and battery.

Passing this bill will give visibility to the hidden burdens that victims face and send a message that in Wisconsin we understand it takes more than physical recovery to be whole again. The reality for survivors is physical, psychological, and financial. Getting real justice has for far too long been an empty concept to victims of sexual assault or domestic violence. They should not have to suffer economically as well, often for a long time, as they try to put the pieces of their lives back together.

Let us help them by putting the burden of this where it belongs...on the perpetrators.

**Please vote YES on SB 337 and SA2 (Sen. Coggs).**





Women's Council  
· Wisconsin ·

WOMENSCOUNCIL.WI.GOV

**Testimony to the Senate Committee on the Judiciary, Corrections,  
Insurance, Campaign Finance Reform, and Housing  
February 18, 2010 – State Capitol, Madison WI**

Thank you Senator Taylor, Chair, and members of the Senate Committee on the Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing for the opportunity to provide testimony on Senate Bill 337, the Wisconsin Gender Violence Act.

**About the Wisconsin Women's Council.**

Established in 1983, the Wisconsin Women's Council is a state government agency and Wisconsin's statutory commission on the status of women and girls. The Council's 15-Member Board is appointed by the Governor, Senate President, Senate Majority Leader, and Assembly Speaker.

**IN SUPPORT OF SB 337**

Please accept this testimony on behalf of the Wisconsin Women's Council in **support** of Senate Bill 337, commonly known as the Wisconsin Gender Violence Act.

Fifteen years ago, the Federal government enacted the Violence Against Women Act (VAWA) – landmark legislation giving official recognition to the crimes of gender violence such as domestic violence, sexual assault, and stalking. In the lead-up to passing the VAWA, Congress recognized that violence against women constituted a grave civil rights problem and an economic burden on the nation.

Senate Bill 337 builds on this Federal action to recognize violence against women as a serious civil rights issue. In many aspects of law and society, we recognize that an individual should not be subjected to violence, oppression or unequal opportunity because of an aspect of that individual's identity, such as race, religion, ethnicity, or sexual orientation. We have been slow, however, to recognize gender violence as a problem of equal magnitude.

By allowing a civil cause of action in state court for violence against women, we allow victims to shift the financial burdens of sexual assault and domestic violence back to where they belong—in the pockets of those who batter and rape. Today, it is the victim who is most often responsible for the costs of putting the pieces of her life back together, including health and mental health care costs, lost income, and attorney fees.

continued

**Wisconsin Women's Council  
Testimony on SB 337**

By allowing a civil cause of action for violence against women, it is more likely that survivors will obtain justice. Because our society is relatively new to recognizing and responding to the realities of sexual assault and domestic violence, there is a limited legal history of survivors suing rapists and batterers in civil court. Therefore, lawyers are more reluctant to take cases based on gender violence, relative to other personal injury suits. The Wisconsin Gender Violence Act would provide a specific statutory cause of action, which will encourage victims to obtain justice and private lawyers to represent them.

In passing the Violence Against Women Act, the U.S. Congress recognized that gender motivated violence represents a grave civil rights problem and an economic burden on our nation. Passage of the Wisconsin Gender Violence Act will signal that our State Legislature too understands that violence against women is an important civil rights issue that negatively affects our citizens and our communities. We respectfully urge your support of this important proposal.

Thank you for the opportunity to provide testimony.

Respectfully submitted,  
Christine Lidbury  
Executive Director